(12)

No. 02-1824

In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Haley does not attempt to defend the rule adopted by the Fourth and Fifth Circuits that the "actual innocence" exception applies only to habitual offender findings in noncapital sentencing. Nor does Haley argue for the rule adopted by the Second Circuit that the "actual innocence" exception applies to any fact resulting in a higher sentence. Instead, Haley suggests a new rule—not adopted by any court of appeals—that the "actual innocence" exception apply to any noncapital sentencing enhancement that increases the statutory maximum penalty.

Haley and his *amici*'s urged erosion of the procedural default rule is unpersuasive. Their arguments fail to give the proper consideration to the Court's "actual innocence" jurisprudence, which has consistently limited the exception to the extraordinary circumstances where a petitioner can demonstrate factual, not legal, innocence, and they ignore the State's strong interest in protecting its procedural rules. Haley would have this Court extend the "miscarriage of justice" exception to a broad class of noncapital sentencing claims in a way that would undermine the procedural default rule and the principles of federalism and comity on which it is based.

The cause and prejudice standard is broad enough to prevent unjust imprisonment in virtually every circumstance—indeed, it could well have provided Haley relief had he preserved his ineffective assistance claims—and the "ends of justice" do not compel extending the exception to the noncapital sentencing context where it could well become subject to widespread abuse. Accordingly, the Court should reverse the judgment of the court of appeals and hold that the "actual innocence" exception does not

allow review of procedurally defaulted claims of noncapital sentencing error.

I. PRINCIPLES OF FEDERALISM, COMITY, FINALITY, AND CONSERVATION OF RESOURCES WEIGH AGAINST EXPANDING THE "ACTUAL INNOCENCE" EXCEPTION TO REACH PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR.

A. The State Has Significant Interests in Ensuring the Integrity of Its Procedural Rules.

Haley and his *amici* erroneously contend that Texas has no legitimate federalism or comity interest in enforcing Haley's sentence because it is contrary to Texas substantive criminal law. Resp. Br., at 18; Brief of Zachary W. Carter, *et al.* ("Former Pros. Br."), at 21-22; Brief for Professors of Law James S. Liebman, *et al.* ("Law Prof. Br."), at 21-23. They argue further that the federal court actually vindicated Texas substantive law by granting Haley's request for habeas relief. Haley and his *amici* are, however, ignoring the State's strong interest in enforcing its *procedural* law.

Comity is implicated whenever a federal court upsets a state-court judgment. The affront to the State is particularly great when a federal court upsets a state-court judgment on a claim never presented to the state court; it matters little whether the law alleged to have been violated is substantive or procedural. Indeed, the Court has expressly recognized the importance of procedural rules to the State and the particularly high costs to the values of finality, comity, and federalism that result from issuance of the writ under these circumstances. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) (recognizing that the costs of habeas relief are "particularly high when a trial default

has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts").

In making the argument that federalism and comity are served, rather than undermined, by the federal court's issuance of the writ, Haley and his *amici* ignore Texas's procedural rules, which bar relief if a claim is not raised in a timely manner on direct review. Texas has already weighed the relative importance of its substantive and procedural rules and has determined that the procedural bar rules should take precedence. Haley would have the federal courts reverse the State's reasoned policy choice and dictate that Texas's substantive law necessarily trumps its procedural rules.

Indeed, Haley's argument proves too much. The essential premise of the procedural default rule is that, *even with a meritorious claim*, a habeas petitioner should be denied relief if he failed properly to preserve the error. Haley's argument would mean that every time there was in fact a state substantive law error in a sentence (by hypothesis, in every such habeas petition) a federal court would be justified in disregarding the state procedural bar in the name of vindicating "federalism" and the state substantive law. But state law already resolves the matter by determining that procedural default bars consideration of any substantive error, and so federalism is subverted, not respected, when a federal court sets aside that determination.

More fundamentally, the purpose of federal habeas review is not to vindicate state law but to ensure respect for federal law and the federal Constitution. As the Court held in *Pulley v. Harris*:

> "[u]nder 28 U.S.C. §2241, a writ of habeas corpus disturbing a state-court judgment may issue *only* if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' *A federal court may not issue the writ on the basis of a perceived error of state law.*" 465 U.S. 37, 41 (1984) (citing 28 U.S.C. §2241(c)(3)) (emphases added).

Federal courts cannot justify rewriting established Texas procedural law based on state, rather than federal, legal considerations. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Therefore, even if Haley were correct that under Texas law the substantive limitations on sentence enhancement should supersede the procedural bar rules, state, rather than federal, courts are the proper arbiters of that determination.

B. The State Has a Significant Interest in Preventing Abusive Trial Conduct and Avoiding Costs Associated with Resentencing.

Haley and his former prosecutor *amici* erroneously claim that there is no need to preclude review of claims like Haley's because there is no danger of sandbagging when a defendant is asserting that he is "actually innocent" of the facts necessary to support a sentencing enhancement. Resp. Br., at 22; Former Pros. Br., at 23. This argument, however, fails to give due consideration to the State's interests in finality and conservation of resources.

First, although the danger of sandbagging may not be quite as great in the sentencing context as during the adjudication of guilt or innocence, it certainly exists. If the

State believes that it is obtaining the appropriate level of punishment by relying on one particular recidivist sentencing enhancement, the State may forgo other charges or other possible grounds for sentencing enhancements. If a defendant waits until collateral review to challenge the enhancement on which the State has relied, the State may be deprived of the opportunity to pursue other sentencing options because of lost evidence, missing witnesses, or the running of a statute of limitations. Because such belated challenges may prevent the State from availing itself of other charges or grounds for enhancement, there is a danger that defendants will avoid the full punishment that is appropriate.

For this reason, Haley and his *amici*'s contention that the costs of resentencing will always be low and relatively easy to administer is inaccurate. *See* Resp. Br., at 22-23, 34-35; Former Pros. Br., at 27-28; Law Prof. Br., at 20, 21, 23, 26. The State's ability to advance alternate grounds for enhancement or bring additional criminal charges may be entirely frustrated by the passage of time, and will certainly require significant additional time and resources.

Second, as Haley acknowledges, concern about sandbagging is only one reason for the procedural default rules. *See* Resp. Br., at 22. Even discounting intentional sandbagging, if procedural default rules can be easily evaded, defendants and defense counsel will have less reason to be diligent about asserting all claims at trial and on direct appeal. Apart from creating perverse incentives, weakened finality interferes with the retributive, deterrent, and rehabilitative purposes of criminal law, and may prevent the imposition of the appropriate punishment because the passage of time thwarts efforts for retrial and resentencing.

C. The Length of Haley's Sentence Should Not Overcome the State's Concerns.

Haley's argument that his "actual innocence" claim must prevail over the State's interest in enforcing its procedural default rules is premised on the assumption that it is simply too great an injustice for someone to be in jail for over sixteen years for committing this particular crime. However, this sentence was imposed by a jury of twelve of Mr. Haley's peers, who examined all the evidence and decided that this sentence was appropriate and just. Furthermore, a defendant who engaged in the exact same conduct as Mr. Haley, but committed his second felony three days later, would not be able to challenge his sentence at all—notwithstanding any assertion that the jury's reasoned conclusion was "unjust." And that is because the Texas Legislature has reasonably determined that a career criminal—which, for all intents and purposes (except for the three-day date discrepancy) Haley unquestionably is—is deserving of a substantially longer sentence than a one-time offender.

Haley's appeal to equity is also significantly undercut by the limited rule he offers. His rule focuses not on the absolute length of the sentence, but rather on whether the enhancement mechanism was effectuated by increasing the maximum sentence allowed. Thus, under Haley's theory, a prisoner who was statutorily subject to a broad sentencing range of two-to-twenty years, and sentenced to twenty—even with the judge expressly predicating that sentence on the same mistake of fact concerning the sequential nature of the multiple convictions—would be

allowed no relief.[1] And, in neither Haley's case nor that hypothetical unserved by Haley's proposed rule would there be any manifest inequity. There would be legal error, but error that could have and should have been addressed through objection at trial or on direct appeal, not collateral federal review following procedural default.

II. The Fact That Haley's Sentence Was in Error Under State Law Does Not Dictate That He Should Be Allowed to Overcome His Procedural Default Under the "Actual Innocence" Exception.

A. The Question Whether Haley Could Have Obtained Habeas Relief Had He Not Procedurally Defaulted Is Irrelevant.

Haley and his law professor *amici* argue that habeas corpus has traditionally been available where the sentencing court lacked legal authority to impose the sentence that it imposed. Resp. Br., at 9, 11-12; Law Prof. Br., at 11-17. Accordingly, they contend, it would be a fundamental miscarriage of justice to deny Haley habeas relief.[2] But

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[1] In effect, Haley accepts that finality, comity, and resource concerns can trump erroneous sentences arithmetically greater than the sentence involved here.

[2] Haley offers the Court's decision in *Townsend v. Burke*, 334 U.S. 736 (1948), in support of this argument. In *Townsend*, the Court granted relief based on a due process violation—in particular, the absence of counsel at the defendant's sentencing hearing during which erroneous information was received. *Id.*, at 741. The Court suggested that it was the absence of counsel—not the sentencing error—that was the critical feature: "Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. *But even an erroneous judgment*, based on a scrupulous and diligent search for truth, *may be due process of law. Id.* (emphasis added).

these arguments entirely ignore the additional significance of Haley's procedural default.

The question presented in this case is not whether a defendant's claim that his sentence is unlawful is *generally* cognizable on habeas. It may well be, but the question presented in this case is whether habeas relief from a noncapital sentence is available *when the defendant has procedurally defaulted that claim* by failing to raise it on direct review, and where the defendant has not asserted cause and prejudice to excuse the default.[3] Even if a claim of an unlawful sentence is generally cognizable, review is properly foreclosed when the claim has been procedurally defaulted unless the claim falls under the narrow "miscarriage of justice" exception for "actual innocence."

B. Haley Could Have Established His Right to Relief by Demonstrating Cause and Prejudice for His Default.

Even if Haley and his *amici* are correct that, historically, habeas would issue to correct an erroneous noncapital sentence, review of such a claim—once procedurally defaulted—is properly pursued under the

[3] Haley and the law professor *amici*'s reliance on Paul Bator's article, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 HARV. L. REV. 441 (1963), for the proposition that habeas relief was historically available to correct an unlawful sentence is therefore misplaced. Although Professor Bator discusses the circumstances under which courts traditionally granted relief, his article expressly does not "propose to deal with the vexing question whether a state prisoner who fails to raise his federal contentions in accordance with state procedural law loses his right to raise them on federal habeas corpus." *Id.*, at 444. Accordingly, his academic discussion offers no guidance to the Court on the proper resolution of this case.

Court's well-established cause and prejudice test. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Satisfying the cause and prejudice test is the proper avenue to correct erroneous noncapital sentences. In the vast majority of cases—such as those adverted to by Haley's *amici*—cause and prejudice will provide ample outlet to correct improper sentences. If a petitioner cannot demonstrate cause, then there is good reason to deny federal habeas relief to avoid making an end run around the state trial proceedings.

Indeed, in this case, a substantial argument can be made that Haley could have demonstrated cause. *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (holding that ineffective assistance of counsel constitutes cause for a procedural default); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984). Despite the high burden that the *Strickland* test presents, *Carrier*, 477 U.S., at 488-89; *Strickland*, 466 U.S., at 690, under these facts Haley may well have been able to cross that bar. The error at issue was plain on the face of the evidence admitted at sentencing and could have been noticed by his attorney's even skimming the documents at issue.

But the magistrate judge declined to grant relief on that ground, and Haley did not cross-appeal that determination. Nevertheless, the fact that in this one isolated instance a petitioner who may have been able to demonstrate cause failed to press his ineffective assistance claim should not become a mandate to expand the "actual innocence" exception to all noncapital sentencing issues.

There are likely to be very few cases where a petitioner cannot demonstrate cause and prejudice with

respect to procedurally defaulted noncapital sentencing errors but nonetheless can raise a compelling equitable argument for his relief. But, if this Court extends the "actual innocence" exception to all noncapital sentencing errors, there are likely to be a great number of petitioners who raise such arguments, consuming time and resources from the States and the courts for innumerable federal court challenges of state convictions. And, the door would be opened for some lower courts, applying this Court's precedents more broadly than they are written, to grant the writ and set aside state sentences with increasing regularity.

In any event, even if Haley were to lose in this Court, it is still possible that he would ultimately receive relief. Although the magistrate judge denied all of Haley's "remaining claims," Pet. App. 55a, 37a, she did "not address" the ineffective assistance claims concerning sentencing, Pet. App. 51a, and on remand the court of appeals could deem Haley's *pro se* pleadings sufficient to preserve that claim. Thus, his particular factual circumstances should not justify expanding the exception to the procedural default rule across the board.

C. Haley's Claim That His Sentence Is Invalid Under State Law Is Not Cognizable On Habeas Review.

Moreover, although there is some uncertainty about the circumstances under which habeas corpus was

traditionally available, *see* Law Prof. Br., at 12-13,[4] there can be no question that, under the current federal statute authorizing habeas relief, habeas is available only to correct a violation of "the Constitution or laws or treaties of the United States." 28 U.S.C. §2241(c)(3). This Court has squarely held that the mere fact that a sentence is unlawful under state law is not a grounds for federal habeas relief because federal habeas corpus is not designed to vindicate state law. *See Pulley*, 465 U.S., at 41. Therefore, Haley's claim that his sentence is erroneous under state law does not support his claim for habeas relief.

Haley argues that the lack of evidence supporting his sentencing enhancement amounts to a due process violation similar to a *Jackson v. Virginia* claim that there was insufficient evidence to support one of the elements of the underlying offense. 443 U.S. 307 (1979); Resp. Br., at 43-46. But this Court has never recognized such a due process claim.

Indeed, Haley's reliance on *Jackson* only serves to highlight the inherent flaw in his basic contention that he

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[4] Indeed, the cases cited by the Law Professors for their argument that habeas relief was traditionally available to correct an unlawful state sentence did not even involve state sentences. Rather, they involved claims by federal prisoners challenging their sentences as unconstitutional or in violation of the laws of the United States. *See, e.g., Ex Parte Lange*, 85 U.S. 163, 176 (1873) (granting habeas relief on double jeopardy claim); *Ex Parte Snow*, 120 U.S. 274, 285-86 (1887) (same); *Ex Parte Nielsen*, 131 U.S. 176, 190-91 (1889) (same); *Ex Parte Wilson*, 114 U.S. 417, 429 (1885) (federal prisoner convicted without proper indictment); *In re Mills*, 135 U.S. 263, 268 (1890) (federal sentence not authorized by law).

is "actually innocent." Haley's theory is as follows: because the evidence was legally insufficient to sentence him as a habitual offender, he is "actually innocent" of the sentence. Therefore, it would be a miscarriage of justice to deny him habeas relief under the procedural default rule.

Under Haley's logic, any conviction or sentence that was based on allegedly insufficient evidence would result in an "actually innocent" defendant being convicted and sentenced. If Haley is correct in his conclusion that a fundamental miscarriage of justice necessarily results in this circumstance, then the procedural default rule would be inapplicable to claims of legal insufficiency. That proposition cannot be squared with the Court's clear understanding, expressed in *Jackson*, 443 U.S., at 321, that insufficiency-of-the-evidence claims can be procedurally defaulted, and with the Court's repeated insistence that the "actual innocence" exception remain "narrow" and applicable only to the most "extraordinary circumstances." *See, e.g., Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989).

III. THE "ACTUAL INNOCENCE" EXCEPTION SHOULD NOT BE EXPANDED TO ALLOW REVIEW OF PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR.

A. The Court's Decision in *Sawyer v. Whitley* to Apply the Exception in Capital Cases Should Not Dictate the Result in Noncapital Cases.

Haley erroneously argues that the Court's decision in *Sawyer v. Whitley*, 505 U.S. 333 (1992), forecloses the Director's argument that the "actual innocence" exception should not apply to noncapital sentencing cases. Resp. Br.,

at 13. To reach this conclusion, he describes *Sawyer* as creating an "eligibility test" that grants relief based on the sole criterion that the alleged error "undermined the accuracy of the guilt or sentencing determination." *Id.* (quoting *Smith v. Murray*, 477 U.S. 527, 538-39 (1986)). But *Sawyer* did not create a general eligibility test for all alleged sentencing errors. The Court should decline to interpret *Sawyer* so broadly.

In *Sawyer*, the Court conspicuously did not hold that the "actual innocence" exception allows review of all procedurally defaulted claims of sentencing error. *Sawyer*, 505 U.S., at 339. Rather, the Court explicitly limited its decision by explaining that in allowing a claim of "innocence of death" it was "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant"—*i.e.*, "the case where the State has convicted the wrong person of the crime." *Id.*

Haley disputes that the Court's statements in *Sawyer* limit the decision to capital sentences. Resp. Br., at 16-17. Haley insists that the Court was "merely contrasting the claim of actual innocence of a sentence in [*Sawyer*] with the more typical claim in a noncapital case that the petitioner is innocent of all criminal conduct." Resp. Br., at 17. The Court did draw the contrast identified by Haley, but the natural implication of the Court's statements is that "innocence of the crime" is the only kind of "actual innocence" in a noncapital case. Indeed, the Court carefully described the claim recognized in *Sawyer* as a claim of "innocence of death" not "innocence of sentence" as Haley would have the Court hold.

At the very least, the Court's statements in *Sawyer* support the Director's arguments that the ordinary and

typical understanding of "actual innocence" is innocence of the crime, that the term does not naturally apply to sentencing, and that the Court has not yet extended the "actual innocence" exception to noncapital sentencing—points that Haley cannot and does not dispute. *See* Pet'r Br., at 22, 23; *see also* U.S. Br., at 14-15.

B. The Compelling and Unique Situation Presented by a Habeas Petitioner Who Claims To Be "Innocent of Death" Justifies a Different Application of the "Actual Innocence" Exception in That Context.

Haley and his *amici* assert that the rules of habeas corpus apply uniformly to capital and noncapital cases in an attempt to buttress their argument that *Sawyer* mandates the result in this case. Resp. Br., at 12-17; Former Pros. Br., at 6-10; Law Prof. Br., at 19-24. That argument, however, ignores the special scrutiny this Court has accorded capital sentences.

The cornerstone of Haley and his *amici*'s argument in this respect is the Court's statement in *Murray v. Giarratano* that it had "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." 492 U.S. 1, 9 (1989). Their reliance on that statement is, however, misplaced.

The Court was referring in *Murray* to its prior conclusion that the additional safeguards imposed by the Eighth Amendment at trial ensure that capital sentences are sufficiently reliable, so that capital defendants may be held to the same "cause and prejudice" standard for excusing procedural defaults as other defendants. *Id.*, at 8-10.

The Court was undoubtedly correct that the procedural default rule should apply uniformly in capital and noncapital cases. But, by its very terms, this Court's "miscarriage of justice" exception looks to matters beyond the strict rules. The Court imported that exception from now-repealed language in 28 U.S.C. §2244 looking to the "ends of justice"; in so doing, the Court sought explicitly to balance equitable factors not encompassed in the text of the federal habeas statute. And, in that equitable balancing, the Court has chosen to recognize the unique nature of the death penalty.

For that reason, in *Sawyer* the Court created the strained construct of "innocence of the death penalty," in order to "construct an analog to the simpler situation represented by the case of a noncapital defendant." 505 U.S., at 339.

The unquestioned severity and finality of the death penalty led to that result in the balancing of interests between the State's interest in obtaining closure to the criminal process and the petitioner's interest in obtaining review. The erroneous imposition of a death sentence is at least as great an injustice as convicting the wrong person of the crime. That fact, combined with the relative infrequency of the death penalty, tipped the balance in favor of applying the "actual innocence" exception in the capital context. By contrast, noncapital sentencing error is alleged far more frequently and has results of far less severity.

Haley is also incorrect in asserting that the finality of the death penalty as compared to a noncapital sentence has no bearing on the degree of injustice entailed by an erroneous sentence. It is true that "just as a person's life cannot be returned, the liberty taken from one who is

unjustly confined can never be restored." Resp. Br., at 15. But a person who has been unjustly confined remains alive—he can seek executive clemency or other redress while incarcerated, and he can look forward to life after release. A person who has been unjustly executed can, of course, do neither. The two situations hardly present "the same result," which is why this Court in *Sawyer* limited its consideration to the narrow circumstances of "innocence of the death penalty."

C. Alternatively, *Sawyer* May Be Understood As Allowing the "Actual Innocence" Exception in Cases Involving Innocence of the Aggravated Offense of Capital-Eligible Murder.

Haley's reliance on *Sawyer* is misplaced for the alternative reason discussed by the *amicus* briefs of the United States and the State of Illinois, *et al.* As *amici* explained, *Sawyer* may be viewed, in light of the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), as addressing innocence of an aggravated offense, rather than innocence of a sentence. Under that interpretation, the Court did not intend *Sawyer* to allow consideration of procedurally defaulted claims of noncapital sentencing error. Haley and his *amici*'s attempts to defeat this argument are unpersuasive.

First, Haley's argument that *Apprendi* is inapplicable to this case because it did not concern the scope of the "actual innocence" exception misses the point. Resp. Br., at 26-27. Haley fails to acknowledge that *Apprendi* and *Ring* may well directly impact the Court's "actual innocence" cases. *Apprendi* and *Ring* make clear that the facts the Court in *Sawyer* referred to as "elements of the capital

sentence" are actually elements of the greater offense of capital murder. Thus, a petitioner's claim that he is innocent of the facts that make him eligible for capital punishment is, under *Apprendi* and *Ring*, a claim that he is innocent of the aggravated offense of capital murder. Properly understood, then, *Sawyer* and the Court's other cases applying the "actual innocence" exception in the capital context do not actually involve innocence of a sentence but innocence of a substantive offense.

Second, Haley's observation that in *Schlup*, 513 U.S., at 326, and *Calderon v. Thompson*, 523 U.S. 538, 560 (1998), the Court continued to characterize the exception as involving innocence of a capital sentence rather than innocence of the aggravated offense of capital murder is of no consequence. Resp. Br., at 28-29. *Schlup* and *Calderon* predate *Apprendi* and *Ring*. When it issued those decisions, the Court had not yet had the opportunity to consider the effect of *Apprendi* on the "actual innocence" exception.

Finally, Haley and his former prosecutor *amici* erroneously argue that, even if *Sawyer* is understood as involving "actual innocence" of an aggravated offense, that understanding supports the court of appeals's holding that Haley is "actually innocent" because he is "actually innocent" of the aggravated offense of theft by a habitual offender. Resp. Br., at 29-31; Former Pros. Br., at 12-13. This argument cannot be squared with the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

In *Almendarez-Torres*, the Court held that the Constitution does not require that recidivism facts—although raising the statutory maximum penalty—be treated as

elements of the crime. 523 U.S., at 230. And *Apprendi* specifically left that decision untouched. 530 U.S., at 490. Accordingly, recidivism facts like prior offenses under a habitual offender statute are not considered elements of the crime under *Apprendi*, but remain sentencing factors.

Haley disputes this interpretation of *Apprendi* and *Almendarez-Torres*, erroneously arguing that the Court in *Apprendi* merely declined to reconsider *Almendarez-Torres* and did not hold that prior convictions that raise the statutory maximum are not elements of the crime. There was no need for the Court in *Apprendi* to restate its *Almendarez-Torres* holding, and it specifically carved recidivism facts out of its holding in *Apprendi*. *See* 530 U.S., at 490 ("Other than the fact of a prior conviction . . . "). *Apprendi* does not *sub silentio* overrule *Almendarez-Torres*, but rather explicitly accommodates it.[5]

Moreover, even if this Court ultimately chooses to overrule *Almendarez-Torres* in some later case presenting that issue, that decision would not provide the relief Haley seeks. That a given fact must constitutionally be submitted to the jury—as Haley's prior convictions unquestionably were—does not mean that the "ends of justice" require extending the "narrow" "actual innocence" exception to the

[5] *Amici* former prosecutors argue without adequate basis that the rule of *Almendarez-Torres* "has effectively been abandoned." Former Pros. Br., at 14-16. That argument cannot be squared with the Court's deliberate recognition of a recidivism exception to the *Apprendi* rule in *Apprendi* itself and with the Court's repeated denial of certiorari petitions presenting the question whether *Almendarez-Torres* should be overruled.

procedural default rule to encompass all noncapital sentencing errors not properly preserved in state court.

IV. THE AEDPA DOES NOT DEMONSTRATE CONGRESSIONAL INTENT TO ALLOW REVIEW OF PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR UNDER THE "ACTUAL INNOCENCE" EXCEPTION.

Haley incorrectly argues that Congress has expressed its intent that the "actual innocence" exception applies to noncapital sentencing by not addressing the general procedural default rules in the AEDPA. Resp. Br., at 23-25. Congress's decision not to legislatively alter the Court's procedural default practice sheds no light, however, on the question presented, and the Court should not attribute this unstated intent to Congress.

The Court has frequently counseled that it is extremely dangerous to draw inferences from congressional inaction. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (stating that, "as a general matter the argument [that congressional intent can be gleaned from congressional inaction] deserves little weight in the interpretive process"); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . ."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990). Such an inference is particularly inappropriate in this case given that Haley has not pointed to any proposed language that was rejected by Congress, or otherwise demonstrated that Congress even considered the question presented here.

Moreover, even if the Court could conclude that Congress's inaction somehow indicated an implicit endorsement of existing law, this Court had never (and has never) applied the "actual innocence" exception in a noncapital sentencing case, and the courts of appeals were (and are) divided on the question, with no court adopting the rule that Haley is advancing here. Attributing to Congress the unstated intent to adopt the rule urged by Haley—despite Congress's silence and the uncertainty in the courts—would stretch the legislative acceptance doctrine too far.

Congress did not intend, and this Court has never held, that the procedural default rule should be set aside for federal collateral attacks of state court noncapital sentences on claims of "actual innocence."

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted,

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